Supreme Court, U.S.
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No. 86-1991

In The
Supreme Court of the United States
October Term, 1986

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CHUCK LAMBERT and
CHUCK'S FEED & SEED CO., INC.,
Petitioner,

vs.

RALSTON PURINA COMPANY,
Respondent.

—o—

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

—o—

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QUESTIONS PRESENTED

I. Whether a Writ of Certiorari should issue when a Petitioner alleges an anti-competitive unfair trade practice but fails to prove at trial a relevant market, an entry barrier to that market and the absence of any pro-competitive effect?

II. Whether a Writ of Certiorari should issue when the Court of Appeals, in interpreting a State "Little FTC Act," *S. C. Code Ann.* § 39-5-10 *et seq.* (1976) is guided by prior FTC and Federal court interpretations of the *FTC Act,* 15 *U.S.C.A.* § 45(a)(1) pursuant to the State statute's direction, *S. C. Code Ann.* § 39-5-20(b)?

III. Whether a Writ of Certiorari should issue on Petitioner's claim when that claim was dismissed at trial, not appealed, and is now merely relabeled as an unfair trade practices claim?

IV. Whether the Supreme Court should review a decision of the Fourth Circuit Court of Appeals on factual grounds in a private dispute, where those facts have no bearing on the statutory interpretation made by the Appellate Court?

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SUMMARY OF ARGUMENT

The Supreme Court has expressed the opinion that a grant of a Writ of Certiorari requires the existence of special and compelling issues. The Petition before the Court has failed to demonstrate the existence of these special and important issues. Supreme Court Rule 17 sets the criteria illustrative of the reasons for granting a Writ. None of the criteria are met in this instance. No decision of a Circuit Court of Appeal is in conflict with the decision of another Circuit Court of Appeal. No Federal question has been decided which is in conflict with a South Carolina Supreme Court decision. No important question of Federal law remains unsettled, nor is the decision in conflict with the decisions of this Court.

The Fourth Circuit, following established precedent, applied a rule of reason standard and held in this case that the Petitioner failed to supply the evidence necessary to meet the burden required under the standard. *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). The Fourth Circuit ruled that the Petitioner's evidence could not support its unfair trade practices claim. The Petitioner failed to appeal the verdicts against him on his original *Sherman Act, Clayton Act*, and common law wrongful termination claims. Those claims are not before this Court.

The Petitioner is now asking this Court to rehear his claims on the merits. Certiorari is not available simply to review the facts of a private dispute. The only evidence presented at trial and on appeal relates solely to the Petitioner's individual disagreement with Ralston-Purina.

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STATEMENT OF THE CASE

This matter was initiated by the Petitioner Chuck Lambert filing suit against the Ralston-Purina Company on January 25, 1983.[1] The case was filed in the United States District Court for the District of South Carolina seeking recovery on four causes of action:

1. Section 3 of the Clayton Act, *15 U.S.C.A. § 14 et seq.;*
2. Violation of Section 1 of the Sherman Anti-Trust Act, *15 U.S.C.A. § 1 et seq.;*
3. Violation of the South Carolina Unfair Trade Practices Act, *S.C. Code Ann.* § 39-5-10, *et seq.* (1976); and
4. A common law cause of action under South Carolina law for wrongful termination.

The impetus for this suit was the cessation of business between Ralston-Purina and the Petitioner who operated a retail feed and seed store. The Petitioner operated his business as a sole proprietorship. He began his dealings with Ralston-Purina in that fashion in 1975. Subsequently the store was incorporated but the relationship between Ralston-Purina and Chuck Lambert individually remained the same. At trial the Petitioner was permitted to add the corporation as a party in interest.

At the close of the evidence at trial, Ralston-Purina moved for a directed verdict. The court granted a directed verdict on the State common law wrongful termination

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[1]Purina Mills, Inc. is the relevant party in interest. Ralston-Purina divested itself of Purina Mills on October 2, 1986. Purina Mills is now a wholly owned subsidiary of B. P. North American. B. P. North American is in turn a wholly owned subsidiary of British Petroleum.

cause of action in favor of Ralston Purina. The remaining causes of action were submitted to the jury. The jury returned a verdict in Ralston-Purina's favor on the *Sherman Act Anti-Trust* and *Clayton Act* causes of action. A verdict in favor of the Petitioners on the South Carolina *Unfair Trade Practices Act* was returned. The Court trebled the damages and assessed attorneys' fees in accordance with the statute. *S. C. Code Ann.* § 39-5-140 (1976). Ralston moved for judgment notwithstanding the verdict or for a new trial. The motions were denied.

Ralston-Purina appealed the verdict to the Fourth Circuit Court of Appeals. The appeals court reversed. 810 F.2d 1289 (4th Cir. 1986). The Petitioner sought a rehearing or hearing *en banc*. The Petition for re-hearing or hearing *en banc* was denied by the Fourth Circuit panel.

I. THE WRIT SHOULD NOT ISSUE BECAUSE THE FOURTH CIRCUIT COURT OF APPEALS, IN INTERPRETING THE INDEPENDENT MEANING OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT CORRECTLY HELD THAT TO ESTABLISH A CLAIM FOR AN ANTI-COMPETITIVE PRACTICE THE PLAINTIFF MUST ESTABLISH A RELEVANT MARKET, THE DIFFICULTY OF ENTRY TO THAT MARKET BY COMPETITORS, AND THE ABSENCE OF PRO-COMPETITIVE FACTORS, NONE OF WHICH THE PLAINTIFF WAS ABLE TO PROVE AT TRIAL.

The Court of Appeals for the Fourth Circuit was called upon to interpret the independent meaning of the South

Carolina *Unfair Trade Practices Act*. The *Unfair Trade Practices Act* aims at two distinct kinds of conduct: unfair or deceptive practices, and anti-competitive practices. Only anti-competitive allegations were at issue in this case. (Pet. for Cert., p. 4). Following the statute's mandate the Court thoroughly analyzed the scope of the *FTC Act* and its relation to Federal anti-trust statutes. These statutes and the decisions interpreting them hold that the exclusive dealing arrangement that Ralston-Purina is accused of fostering is not *per se* a violation. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). The kinds of exclusive dealing acts in this case only violate the trade regulation laws if they are likely to foreclose entry into a substantial part of the market to the benefit of the exclusive dealer. *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Standard Oil Co. of California v. U.S.*, 337 U.S. 293, 314 (1949); *Beltone Electronics Corp.*, 100 F.T.C. 68 (1982). The Petitioner failed to prove this market foreclosure. He failed to show a scheme designed to benefit the alleged exclusive dealer. He ignored the presence of the pro-competitive effects from the alleged acts.

A vertical restraint, such as alleged here, calls for a rule of reason analysis. The Court must consider pro-competitive justifications for any alleged restraint. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). These anti-trust principles provide the basis for the examination undertaken by the Appellate Court. They are necessary to decide whether Section 5 of the *FTC Act*, and by implication the *Unfair Trade Practices Act*, was violated. *Beltone Electronics Corp., supra.*

The Petitioner here failed to establish his relevant market. More importantly, the Court of Appeals held that

he failed to prove the existence of any market entry barrier. The Petitioner presented his case as a private dispute with a complete absence of anti-competitive proof; elements necessary to prevail on his claim. *Continental TV, Inc. v. GTE Sylvania, Inc., supra.* As the Fourth Circuit observed in *Glaesner v. Beck/Arnley Corp.*, 790 at 387:

> Such divergent versions of the facts and the reciprocal casting of blame are common when expectations engendered by business dealings fail to materialize. Mutual recrimination and suspicion may typify times when profits are low and dealings turn sour. Such diverging views do not, however, ordinarily give rise to an action in tort or create a jury question as to which party's version of business reality is the right one.

In cases of dealer termination, reference to the rule of reason analysis adopted by this Court supports the rationale of the appeals court. The Petitioner failed to establish an anti-competitive practice that comes within the ambit of the statute.

II. THE WRIT SHOULD NOT ISSUE BECAUSE THE FOURTH CIRCUIT COURT OF APPEALS, CONFORMING WITH ITS STATUTORY MANDATE, S. C. CODE ANN. § 39-5-20(b) (1976), CORRECTLY INTERPRETED THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT, S. C. CODE ANN. § 39-5-10 ET. SEQ. (1976) BY RELYING ON PRIOR FEDERAL TRADE COMMISSION AND COURT INTERPRETATIONS OF THE FTC ACT, 15 U.S.C. § 45(a)(1).

The South Carolina *Unfair Trade Practices Act*, § 39-5-20(a) (1976) prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."

Little guidance on the scope and reach of the statute is provided within the wording of the Act itself. Express direction is given, however, by § 39-5-20(b). This part sets forth the state legislature's "intention" that construction of 39-5-20(a) be "guided by the interpretations given by the FTC and the Federal Courts to § 5(a)(1) of the *FTC Act* (15 U.S.C. 45(a)(1)) . . ." This is the section utilized by both the trial court and appellate court in rulings on issues in this case.

The Petitioner here cites the Fourth Circuit opinion in *Bostic Oil Co. v. Michelin Tire Corp.*, 702 F.2d 1207, 1220 (4th Cir. 1983) as a basis for the assertion that a conflict of authority exists among the federal circuits. *Bostic* purportedly holds that interpretations of the *Unfair Trade Practices Act* should not be restricted to cover only those practices which would be unlawful under § 15(a)(1) of the *FTC Act*. *But see, Glaesner v. Beck/Arnley Corp.*, 790 F.2d 384, 390 (4th Cir. 1986) ("It is unclear whether wrongful termination alone will support a South Carolina *Unfair Trade Practices Act* claim."); *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42 (4th Cir. 1983).

A careful reading of the entire section of *Bostic*, quoted piecemeal by the Petitioner, discloses that his reliance on that case is misplaced. The Court in *Bostic* held that if one did not have an unfair trade practice which would fall under the interpretations of the *FTC Act*, a cause of action might still exist under South Carolina law regarding wrongful termination. 702 F.2d at 1220. *De-Treville v. Outboard Marine Corp.*, 439 F.2d 1099, (4th Cir. 1971). The claim, which presumably still existed in *Bostic* under South Carolina law for wrongful termination, was dismissed in this case. The Petitioner here could not

prove that cause of action. The Petitioner here could not establish that a wrongful termination, and therefore an unfair trade practice for the act of termination, existed.

Courts applying South Carolina law have found wrongful termination only in extraordinary circumstances. *Richland Wholesale Liquors v. Glenmore Distilleries Co.*, 818 F.2d 312 (4th Cir. 1987). In this case the Petitioner recouped his entire investment. He provided Ralston-Purina with nothing under the parties' arrangement except his services. He was not left with any unsold inventory. *Burger Brewing Co. v. Sumner*, 261 F.2d 261 (4th Cir. 1958); *Glaesner v. Beck/Arnley Corp., supra; Richland Wholesale Liquors v. Glenmore Distilleries, supra.* Petitioner did not prevail on his claim of wrongful termination.

The Petitioner did not appeal the ruling of the trial court dismissing his state common law claim for wrongful termination. If the termination as a wrongful act is not now before the Court, then reliance on the *Unfair Trade Practices Act* has to rest on some other articulated cause of action, such as a violation of the *Sherman Act*, the *Clayton Act*, or a violation of the *FTC Act*. Here, the *Sherman Act* and *Clayton Act* allegations were decided adversely to the Petitioner by the jury. Those determinations were not appealed to the Fourth Circuit, and are not before this Court. *E.E.O.C. v. Fed. Labor Relations Authority*, 106 S.Ct. 1678 (1986); *Carlson v. Green*, 446 U.S. 14 (1980); *Cort v. Ash*, 422 U.S. 66 (1975); *Lawn v. U.S.*, 355 U.S. 339 (1958) cf. Sup. Ct. R. 17. The Fourth Circuit correctly focused its analysis on the interpretation of the *FTC Act* concerning anticompetitive practices. The Court found the Petitioner's proof at trial deficient.

III. THE WRIT SHOULD NOT ISSUE BECAUSE A CLAIM OF WRONGFUL TERMINATION UNDER SOUTH CAROLINA LAW, DISMISSED AND UNAPPEALED, DOES NOT GIVE RISE TO AN IDENTICAL CLAIM UNDER THE GUISE OF THE UNFAIR TRADE PRACTICES ACT.

The Petitioner seems to argue in his Petition that the South Carolina *Unfair Trade Practices Act* creates a new cause of action without reference to any other statutory or common law cause of action heretofore articulated. The Petitioner however fails to raise any recognized legal cause of action. Indeed, Ralston has consistently maintained that the *Unfair Trade Practices Act,* if without reference to any other statutory or common law cause of action, is constitutionally infirm because of vagueness. The statute, if it is to be interpreted without reference to any other objective standard of conduct, fails to provide a potential defendant with any reasonable notice of proscribed activity. *FTC v. Gratz,* 253 U.S. 421, 430 (1919) (Brandeis, J., dissenting).

It is correct, as pointed out by the Petitioner on page 7(b), the District Court visualized the factual predicate for a common law cause of action would be separate from that under the *Unfair Trade Practices Act.* The District Court went on however to dismiss the common law cause of action. The Petitioner did not appeal that ruling. The *Unfair Trade Practices Act* claim then has to relate to an *FTC Act* standard or on another statutory or common law cause of action. The Petitioner raised no other common law basis for his cause of action. The other statutory causes of action were resolved against the Petitioner and were not appealed. The Fourth Circuit then correctly applied the analysis of the Federal Trade Commission to the case.

It held the Petitioner failed to show sufficient negative impact on the market.

The Fourth Circuit decision may have foreshadowed the subsequent holding of the South Carolina Court of Appeals in *Noack v. Country Corner of Hilton Head,* 290 S.C. 475, 351 S.E.2d 347 (S.C. App. 1986) *cert. granted.* (June 4, 1987, Op. No. 0828). The Petitioner here presented evidence which only related to his own individual experience with Ralston-Purina. Not only does this evidence fail under the analysis of the *FTC Act* performed by the Fourth Circuit, it fails under the independent analysis of the *Unfair Trade Practices Act* by the state court in *Noack.*

The Court in *Noack* in analyzing the *Unfair Trade Practices Act,* held that the statute required evidence of impact on the public interest. The *Unfair Trade Practices Act* was held not to be available simply to redress an alleged private wrong. Here, the Supreme Court should not act to redress a private wrong in an individual case. *Watt v. Alaska,* 451 U.S. 259 (1981). Under the Fourth Circuit's, *FTC Act* analysis, the Petitioner's evidence only related to his individual experience with Ralston-Purina. No showing of market impact was made. The evidence presented at trial failed independent analysis under the *Unfair Trade Practices Act* because that evidence, at best, inferred only a private wrong.

IV. THE WRIT SHOULD NOT ISSUE BECAUSE THE PETITIONER SEEKS MERELY TO RE-ARGUE QUESTIONS OF FACT WHICH HAVE NO BEARING ON THE QUESTIONS OF LAW PRESENTED TO THE COURT OF APPEALS CONCERNING THE REACH OF THE UNFAIR TRADE PRACTICES ACT.

The Petitioner seeks to resurrect his cause by engaging in a primarily factual argument which is at best disingenuous. He points to several "facts" allegedly overlooked by the Fourth Circuit which are purported to demonstrate proscribed conduct by Ralston-Purina. The Supreme Court serves a broader purpose than merely reviewing facts. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *NLRB v. Pittsburgh S.S. Company*, 340 U.S. 498 (1951); cf. *Sup. Ct. R.* 17.

The Petitioner claims a relevant market of a three-county area. At trial evidence was never presented to define that relevant market to any degree of certainty.

If the tri-county area (Charleston, Berkeley and Dorchester) was to be the *relevant* market, testimony relied upon by the Plaintiff came from Ralston-Purina dealers outside of that market. (App. p. 1110-1113). If the tri-county area was to be the *appropriate* market area, the only testimony from a competitor to Ralston-Purina (Con-Agra District Manager) disclosed that he had four stores in the Charleston market alone. Additionally, Con-Agra was free to open a store "wherever and whenever he wanted." (App. p. 310-312).

The disputed factual assertions by the Petitioner are most aptly demonstrated wherein he states that within

two months of termination, Ralston-Purina began selling at retail some products below the wholesale price which the Petitioner paid two months earlier. The Petitioner fails to inform the Court, however, that Ralston-Purina held an annual promotion for all Ralston dealers throughout the country at that time of the year. The Petitioner himself had taken part in this annual promotion for at least the previous five years. The price charged was the same price throughout the entire region during this promotion. The Petitioner seeks by wild factual allegation to create the inference of injustice. His only complaint is dissatisfaction with the Fourth Circuit Court of Appeals opinion.

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CONCLUSION

A grant of a Writ of Certiorari requires special and important reasons. The Petitioner in this case has presented no issue of law; only issues which will inure to his own benefit. The Fourth Circuit Court of Appeals determined that the Petitioner failed to provide the evidence necessary to receive a verdict in its favor on its unfair trade practices claim. The Petitioner, dissatisfied with the Fourth Circuit's reversal of the verdict in its favor, now seeks to have the Supreme Court do nothing more than review the case on the merits.

The Fourth Circuit Court followed the South Carolina Legislature's mandate to interpret the South Carolina *Unfair Trade Practices Act* in accordance with FTC and Federal Court interpretations on the *FTC Act*. The Petitioner did not appeal the verdicts against it on its *Sherman Act*,

Clayton Act and state common law wrongful termination claims. The Petitioner is asking the Supreme Court to hear issues it failed to appeal to the Fourth Circuit. Upon the foregoing reasoning and authority, Respondent respectfully requests that petition be denied.

Respectfully submitted,

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